

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

74-1687

AMICUS CURIAE BRIEF OF THE AMERICAN
PETROLEUM INSTITUTE AND ELEVEN MEMBER COMPANIES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1433

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

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STATES COURT OF APPEALS

Appellee

v.

RUSSELL E. TRAIN, ET AL.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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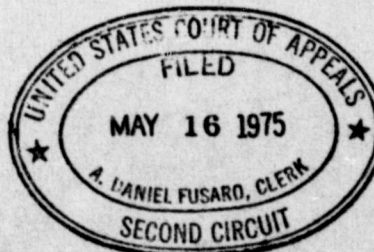


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AMICUS CURIAE BRIEF FOR THE AMERICAN
PETROLEUM INSTITUTE AND ELEVEN MEMBER COMPANIES

PRELIMINARY STATEMENT

The American Petroleum Institute and eleven member companies (hereinafter collectively "API") file this Amicus Curiae Brief, demonstrating in detail that the substantially identical construction of the Federal Water Pollution Control Act (the "Act") offered by both the Environmental Protection Agency ("EPA") and the Natural Resources Defense Council, Inc. ("NRDC") is not only inconsistent with the statutory text, but also contrary to the Act's manifest policy and legislative history as well as EPA's own prior administrative interpretations of the regulatory plan mandated by Congress.

EPA and NRDC take a common, virtually identical position that so-called "effluent limitations guidelines" were intended by Congress as "uniform national effluent limitation standards" to be cranked mechanically into discharge permits for existing plants of widely varying age, processes, geographic and other circumstances.

In fact, such national discharge "standards" would enact harsh, arbitrary, and procrustean restrictions for existing sources, which the statutory text and legislative history as well as sound public policy demonstrate that Congress plainly never intended.

Instead, the Act deliberately established separate regulatory schemes for new and for existing point discharge sources, reflecting the distinct and sharply contrasting policies applicable to plants to be constructed in the future and those already in place.

Specifically, Congress prescribed "across-the-board," national "standards of performance" for new sources, in view of the many more pollution control "options" available to new plants and the greater, and highly variable costs, of "retrofitting" existing plants.

For corresponding reasons, Congress mandated flexible "guidelines" for existing sources, to allow consideration of the literally "infinite variations from case-to-case" to be reflected in individual discharge permits for plants already in operation.

The new source "standards" and the existing source "guidelines" were viewed by Congress as complementary regulatory

mechanisms to achieve Congress' overriding national goal of elimination of the discharge of pollutants by 1985. While new plants could immediately include the "top-of-the-line of current technology," Congress chose a "two-phase" program for existing plants, first to upgrade control technology by 1977 to a "base level" of the "average" of plants "currently in place," and ultimately by 1983 to bring existing plants to an approximate par with the "best" current performer or new plant.

The flexible "guidelines" which Congress chose for implementing this two-phase existing source program require EPA to define initially the requisite control technologies to be applied in 1977 and 1983. As a means of optimizing pollution control progress, and mitigating economic and social dislocations in view of the widely varying circumstances of individual existing plants, Congress directed EPA to identify a "range" of attainable discharge levels and to "specify factors to be taken into account" by State and EPA Regional permit writers in setting effluent limitations for each plant.

EPA's own early interpretations and administration of the Act largely recognize and reflect this pragmatic Congressional plan of flexible "guidelines" to control of existing source pollution. However, cornered by approaching statutory deadlines, mounting backlogs of undecided permit applications, and the pressures of this lawsuit, EPA jettisoned the statutory plan by expedient publication of rigid, nationwide standards for existing sources, and a belated "variance clause" intended to simulate plant-by-plant flexibility where none exists.

Finally, the inequity and scientific invalidity of EPA's approach has been confirmed by the \$515 impartial scientific watchdog committee, which has condemned EPA's overall approach as "arbitrarily established inflexible standards."

BACKGROUND OF THIS AMICUS CURIAE BRIEF

The central issue in this appeal as framed by the parties is whether the District Court correctly ruled that the EPA Administrator is required under Section 304(b) to publish so-called "effluent limitations guidelines" for all existing point discharge sources within one year of enactment of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251 et seq. ("the Act").

As detailed below, however, the opening and supplemental briefs of the parties, as well as questions by the Court in oral argument and the Court's October 3, 1974 Memorandum Opinion, suggest that this central issue may not be finally resolved without consideration of further, underlying questions regarding the nature, purpose and intended utilization of Section 304(b) "guidelines" in the State/Federal permit program of Section 402.

In light of the tight statutory timetable and rapidly approaching deadlines under the Act, prompt resolution of these key, underlying statutory questions is imperative not only to the petroleum industry (whose Tenth Circuit appeal will not be decided for months) but also to the public at large in view of the vast economic and social consequences

which will accompany implementation of the Nation's new water pollution control program.^{1/}

Accordingly, to assist in early disposition of these questions, and in view of the great respect which a comprehensive opinion by this Court would be accorded by courts in other pending litigation, the American Petroleum Institute and eleven member companies requested, and on November 12, 1974, were granted, leave to file this Amicus Curiae Brief.^{2/}

^{1/} In API v. EPA, Nos. 74-1465, 74-1466 (10th Cir., August 7, 1974), EPA moved on September 30, 1974 for a ninety-day stay of judicial review to permit publication and consideration of minor amendments of the petroleum refining "effluent limitations guidelines" and "standards of performance" 39 Fed. Reg. 37069 (October 17, 1974). Subsequently, on November 18, 1974, API filed voluminous legal and technical comments with EPA addressed to all aspects of the challenged petroleum refining regulations as amended.

According to EPA's promised schedule, the appellate record, as supplemented by rulemaking on EPA's October 17, 1974 proposed amendments, will be filed in the Tenth Circuit by December 30, 1974. Assuming EPA meets this promised deadline, complete briefing of legal and technical points, and oral argument before the Court place any decision on the merits well in the future.

^{2/} On November 22, 1974, API filed an unopposed Motion for a Ten-Day Extension of Time, thus making API's Amicus Curiae Brief due on December 6, 1974.

In our brief, we will address the statutory interpretations of the parties as summarized below, and demonstrate in detail why the virtually identical construction of the Act which they offer is not only inconsistent with the statutory text, but also contrary to the Act's legislative history and EPA's own prior administrative interpretations of the regulatory plan mandated by Congress.

SUMMARY OF PROCEEDINGS TO DATE

The opening brief of appellant, Environmental Protection Agency, dealt primarily with the District Court's jurisdiction to entertain NRDC's suit, and, therefore, did not present EPA's overall construction of the Act, including the role of Section 304(b) guidelines in the State/^{3/} Federal permit program.

NRDC's answering brief was not so limited. For, according to NRDC, the EPA Administrator must publish "guidelines" under Section 304(b)(1) of the Act which amount to "uniform national effluent limitation standards" for categories covering all existing point discharge sources. (NRDC Br. 13) (emphasis added).

^{3/} This Amicus Curiae Brief does not discuss the jurisdictional issue, but it may be: (i) that Section 505(a)(2) provides a separate jurisdictional basis for suits against the Administrator dispensing with minimum "amount in controversy" and other jurisdictional requirements; (ii) that the sixty-day notice requirement of Section 505(b)(2) applies only to actions against the Administrator under Section 505(a)(2); and (iii) that other jurisdictional bases for actions against the Administrator, including the Administrative Procedure Act, 5 U.S.C. §§553 et seq., among others, are preserved by Section 505(e).

Under this construction of the Act, the Administrator must impose "effluent limitations on each point source" through permits which "must comply with the same uniform national effluent limitation standards" (Id. 13) (emphasis added).

Counsel for NRDC repeatedly made the same point in oral argument, stressing that "[t]he guideline regulations at issue are standards," and that the States and EPA Regional Administrators lack authority to issue permits to individual existing point sources which vary from the guideline "numbers."^{4/}

At oral argument, when pressed to go beyond the jurisdictional issue, EPA espoused a virtually identical construction to the effect that "effluent limitations guidelines" are actually unbending "standards" applicable on a nationwide basis.

Despite the apparently common EPA/NRDC construction of the Act, however, the Court posed a number of questions to counsel suggesting a substantially different regulatory approach. For example, the Court queried whether the guidelines might not be "some sort of industry group think as to what would be the most practicable" as a generally applicable control technology. Similarly, the Court remarked that EPA is "not in the first instance supposed to modify the guidelines by what has to be adjusted downward because of the limitations in a particular plant."

^{4/} By permission of the Clerk, API was allowed to audit the tape of the September 24, 1974 oral argument before the Court. With the exception of questions from the Court, some of which were not audible, API was able to prepare a nearly complete verbatim account of the proceedings.

Likewise, in the course of a discussion of the dairy products processing industry, the Court puzzled: "You are not supposed to rule in the guidelines as to what is available to a milk processor in terms of location?" And regarding the permit program, the Court asked: "Is the nature of EPA action on applications for permits granting them with deviations from effluent standards?"

Shortly after oral argument, the Court issued a Memorandum Opinion granting "EPA's motion to stay, in part, limited so as to conform with [the Court's] present thinking as to the proper resolution on the merits . . ." (Mem. Op. 2). In general, the Court's interim opinion does not attempt a broad construction of the Act except to state that "Congress intended section 304(b)(1)(A) guidelines to serve as a basis for achieving uniform treatment in the issuance of permits under section 402 . . ." (Id. 4). Although recognizing EPA's "discretion to defer promulgation of guidelines for categories not contained in Section 306(b)(1)(A)," the Court's interim opinion states that "Congress contemplated publication prior to December 31, 1974 of all effluent limitation guidelines" (Id.).

Thereafter, in light of the Court's reservation that its "present thinking" would be "subject to reconsideration during the preparation of a final opinion" (id. fn.1), both EPA and NRDC filed supplemental briefs.

In its brief, EPA generally reiterated its construction of the Act as presented in oral argument. To begin with, EPA challenged the Court's premise in its Memorandum Opinion that Section 304(b) guidelines are "to serve as a basis" for "issuance of permits" since, according to EPA, "[i]f Congress had desired to make Section 402 permits dependent upon the provisions of Section 304(b) (1) (A) guidelines it could have done so . . . in clear, unambiguous terms" (EPA Supp. Br. 4).

In addition, EPA also questioned the Court's statement that "guidelines" are required to cover all existing point discharge sources. For, according to EPA, the Act confers upon the "Administrator discretion to determine that for some industrial categories, effluent limitations guidelines would not be possible or appropriate" (Id. 9). Where this is true, "the absence of effluent limitation guidelines neither impedes the issuance of Section 402 discharge permits nor leads to less vigorous restrictions on discharge of effluents" (Id. 2) (emphasis added). Thus, the permit authority need only examine "the discharges of each applicant, the nature of the specific plant or facilities involved and the corrective actions which that particular plant or facility can take to reduce its discharge" (Id. 5) (emphasis added).

Despite EPA's recognition that individual consideration of the varying circumstances of each "specific plant" does not lead to "less vigorous restrictions," EPA's supplemental brief nonetheless repeated EPA's paradoxical stance

that, once "effluent limitation guidelines" are issued for a source category, all permits must incorporate the discharge numbers in the "guideline" except that "[i]f a particular facility can appropriately be restricted to a smaller discharge than a guideline provides, the permit will require a lesser amount" (Id. 6).

Much of NRDC's supplemental brief addressed the jurisdictional issue. However, regarding the Court's construction of the Act, NRDC argued that after December 31, 1974, the statute intends enforcement actions even as to contested permit conditions which are in the process of expressly authorized administrative or judicial review under Sections 402 and 509.

* * *

Against this summary of the EPA/NRDC construction of the Act, we turn first to the realistic regulatory scheme actually devised by Congress for optimizing pollution control progress by 1985.

As we shall show, Congress chose nationwide discharge standards for new sources, and a two-phased program for existing sources to be implemented by flexible guidelines for setting effluent limitations in individual discharge permits.

Thereafter, we will detail EPA's own prior administrative interpretations, which recognize the pragmatic Congressional, individual plant permit approach for existing

sources. These interpretations were subsequently abandoned when rigid nationwide existing source standards became expedient to meet the tight judicial timetable set by Judge Green and to catch up on the backlog of unissued permits.

ARGUMENT

- I. CONGRESS PRESCRIBED A PRAGMATIC POLLUTION CONTROL PROGRAM FOR EXISTING SOURCES TO BE ACHIEVED THROUGH FLEXIBLE "GUIDELINES," DEFINING TECHNOLOGY FOR 1977 AND 1983, IDENTIFYING A RANGE OF DISCHARGE LEVELS, AND SPECIFYING FACTORS "TO BE TAKEN INTO ACCOUNT" ON A PLANT-BY-PLANT BASIS IN THE STATE/FEDERAL PERMIT PROGRAM.

As summarized above, EPA and NRDC apparently take a common, virtually identical position that "effluent limitations guidelines" were intended by Congress as "uniform national effluent limitation standards" to be cranked mechanically into discharge permits for existing plants of widely varying age, processes, geographic and other circumstances. (NRDC Br. 13).

In fact, "uniform national effluent limitation standards" for existing sources would enact harsh,

arbitrary and procrustean restrictions which Congress plainly never intended.

Instead, as we shall demonstrate, Congress ordered EPA to publish flexible guidelines, (i) "defining" technology for phased introduction by 1977 and 1983; (ii) "identifying" a "range" of attainable discharge levels; and (iii) "specifying factors" so that State and EPA regional officials can account for individual plant differences in separate permits issued to each existing discharge source.

- A. The Act Purposely Distinguishes between Pollution from New Sources, Which Are Subject to "Across-the-Board" National "Standards," and from Existing Sources, Which Are To Be Controlled by "Guidelines" Applied on a Flexible Plant-by-Plant Basis in Permits.

The Act by its own terms manifests Congress' plain intention to avoid procrustean standards for existing pollution sources. For Congress deliberately established entirely different regulatory schemes for new and existing point discharge sources, reflecting the distinct and sharply contrasting policies applicable to plants to be constructed in the future and those already in place.

1. In Light of the Pollution Control "Options" Available to New but Not to Existing Plants, Congress Provided "Across-the-Board" National "Standards of Performance" for New Discharge Sources.

For new discharge sources, Congress mandated rigid "standards of performance" in Section 306(b)(1)(B) designed to be "national" in scope:

"As soon as practicable, but in no case more than one year, after a category is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category" (emphasis added).

The legislative history shows that "[s]uch standards shall be applicable to any new source regardless of where it is constructed" and that "the Administrator must set the standard at a particular volume of effluent or a particular percentage of effluent reduction." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 110 (1972); S. Rep. No. 92-414, 92d Cong., 1st Sess. 59 (1971); Leg. Hist. 797, 1477 (emphasis added).^{5/}

As explained by Administrator Train (then Chairman of the Council on Environmental Quality), "across-the-board" standards for new, as opposed to existing, plants are supported by sound public policy:

"Across-the-board requirements can be justified for new plants, since they have many options in terms of processes, inputs and the like, which is not the case for existing facilities." Testimony before the House Public Works Committee, December 7, 1971, p. 201; Leg. Hist. 1115. ^{6/}

^{5/} Following the official citation to the House and Senate Reports, this Brief cites to page references in the two-volume Legislative History of the Federal Water Pollution Control Act Amendments published by Senate Public Works Committee in January 1973.

^{6/} Senator Muskie made much the same point in an Exhibit containing his views on "significant provisions of the bill", presented during Senate debate on the House-Senate Conference Report.

"[P]ollution control alternatives are available to a new source which are not available to existing sources. It may be that in most instances, the technology for elimination of discharge of pollutants from new sources can be achieved on a considerably more reasonable basis than for existing sources." Leg. Hist. 163, 172 (emphasis added).

Illustrative of the many "options" available to new plants are production process changes which cannot be accomplished by plants already in place:

"The Conference [Section 306] substitute requires establishment of a regulatory mechanism for new sources which anticipates not only that level of effluent reduction which can be achieved by the application of technology (including where practicable elimination of the discharge of pollutants), but also achievement of levels of pollution control which are available through the use of improved production processes, taking into consideration the cost of achieving such reduction." Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 128 (1972); Leg. Hist. 311 (emphasis added).^{7/}

Over and above "improved production processes" which are generally available only to new sources, the House Committee stressed the much greater and highly variable costs of pollution reduction for plants already in place when compared with plants newly built from scratch.^{8/} Thus, the Committee's Report

^{7/} The Conference substitute follows the Senate bill and House amendment except for the deletion of Section 306(b)(1)(C), a provision which would have permitted "appropriate adjustments" from an applicable standard of performance "upon application from any owner or operator of any source" (Id.). The elimination of this provision again underscores that Congress intended standards of performance to apply "across-the-board" to all new sources regardless of location and circumstances.

^{8/} The Senate Public Works Committee provided much the same justification for across-the-board "standards of performance" for new emission sources under Section 111 of the Clean Air Act, 42 U.S.C. §1857c-5. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 15-18 (1970). For as in the Federal Water Pollution Control Act, the rigid national standards for new sources contrast sharply with the more flexible system for control of existing sources under state implementation plans authorized by Section 110 of the Clean Air Act, 42 U.S.C. §1857c-6.

stresses that "across-the-board" new source standards are strongly supported by:

"the significantly lower expense of attaining a given level of effluent control in a new facility as compared to the future cost of retrofitting a facility to meet stringent water pollution control measures" H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 110 (1972); Leg. Hist. 797 (emphasis added).

This explicit Congressional acknowledgement of the disproportionate costs of "retrofitting" existing plants is indicative of the economic and social dislocations which might accompany procrustean application of fixed, nationwide standards to facilities already in operation.

For example, EPA's petroleum refining "effluent limitations guidelines" compel not only add-on, end-of-pipe processes (whose efficiency varies according to climate and crude feedstock type), but also in-plant water conservation measures to reduce the volume of effluent treated by the refinery.^{9/} The feasibility and cost of "retrofitting" existing refineries to achieve these reductions varies enormously -- depending upon the age and original design of the refinery, the processes employed, land availability, and a host of other technical and economic factors.

^{9/} These considerations were most recently detailed in voluminous API legal and technical comments filed with EPA on November 18, 1974. For the convenience of the Court, we attach, as an Appendix to this Brief, API's legal comments which summarize numerous, interrelated legal and technical defects of the petroleum refinery regulations.

Under these circumstances, application of rigid discharge standards to each existing refinery cannot help but produce arbitrary and inequitable disparities among the Nation's over 250 refineries, not to mention large additional outlays to "retrofit" current plants and equipment during a period of looming energy crisis, inflation, and growing capital shortage.^{10/}

When the thousands of existing discharge sources in other industrial categories are considered, the huge social costs of unauthorized and arbitrary implementation of procrustean nationwide standards are magnified enormously.

Accordingly, it is plain why Congress expressly prescribed "standards" for new but not for existing sources.^{11/}

For when the "many options" available to new plants not yet designed and built are compared to the high and variable costs of "retrofitting" existing plants already in place, the

^{10/} The Administration's concern over the potential inflationary consequences of just such "major" regulations was again underscored in an Executive Order issued by President Ford on November 27, 1974, requiring "Inflation Impact Statements" for "all major . . . rules emanating from the Executive branch of the Government."

^{11/} Other sections of the Act demonstrate that Congress consistently chose the term "standard," not "guideline" or "limitation," when across-the-board, national standards were intended. See, e.g., Section 307(a) ("toxic effluent standards"); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 159 (1972); Leg. Hist. 846 (referring to "Federal effluent standards and prohibitions for toxic substances"); Section 307(b) ("pretreatment standards"); Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 129, Leg. Hist. 312 (referring to "national pretreatment standards") (emphasis added).

rational legislative choice was to phase in new technology for existing plants by "guidelines" implemented flexibly through discharge permits, taking into account the widely varying age, engineering design, processes and feedstocks employed, climatic and other factors affecting the pollution control capabilities of each specific plant.

2. Far from Requiring "Uniform National Effluent Limitation Standards" as Claimed by NRDC, Congress Consciously Opted for Flexible Guidelines to Be Applied on a "Plant-by-Plant" Basis so as to Take "Account" of the "Infinite Variations from Case-to-Case" for Existing Sources.

NRDC's claim that "effluent limitations guidelines" are supposed to be "uniform national effluent limitation standards" is refuted by Congress' manifest distinction between the regulatory schemes appropriate for new and for existing sources. Without addressing this Congressional policy, NRDC points instead to a purported legislative determination "that effluent limitations must be uniform across the nation to prevent industries from 'forum shopping' among the States" (NRDC Br. 10) (emphasis added).

Far from supporting unbending national standards for existing sources, NRDC's "forum shopping" bugaboo is inapposite, if not actually misleading. In fact, the very portions of the legislative history cited by NRDC confirm that Congress mandated fixed national standards for new, but not for existing sources in order to deter "forum shopping."

For it is the new source standards under Section 306 which determine whether a firm will move from one part of the country to another, and which must be national in scope if such movement is to be discouraged.

As chief support for its spurious claim that national standards for existing sources are necessary "to prevent industries from forum shopping," NRDC cites a statement by Senator Muskie in the Senate debates pointing to the need for "uniformity" to prevent firms from going to "other areas where there are less stringent requirements." Leg. Hist. 1405. NRDC's citation obscures the fact that the "uniformity" referred to by Senator Muskie was "uniformity" of new source standards under Section 306 as shown by the following exchange between Senators Fannin and Muskie directly preceding the language quoted by NRDC:

Mr. Fannin: "[W]hy should not the Administrator be allowed to recognize locational differences within these categories in establishing the [Section 306] performance standards?"

Mr. Muskie: "If we made those distinctions, what we would do is make it attractive for industries to move into areas where requirements are less restrictive, and we would be transferring pollution from one area to another. We think we need uniformity of regulations." Leg. Hist. 1405 (emphasis added).

Without belaboring the point by further extensive quotations from the legislative history, the policy against "forum shopping," far from suggesting unvarying national standards for existing sources, actually

highlights once again the sharp Congressional distinction between the regulatory schemes adopted for controlling pollution from new and existing sources.^{12/}

For existing sources, Congress recognized that uniform and evenhanded treatment could be achieved only by eschewing a Procrustes bed of rigid national standards for a more pragmatic system of individual discharge permits.

Indeed, EPA stressed the need for this kind of existing source flexibility from the earliest days of Congressional consideration of amendments to the Act. For example, in a Memorandum by John R. Quarles, Jr. (Assistant Administrator for Enforcement and General Counsel), submitted in hearings before the Senate Subcommittee on Air and Water Pollution, EPA recounted its own experience with existing source control under the prior Refuse Act Permit Program:

"After careful review, however, it has been concluded that it is not possible at this time to issue any formal set of guidelines setting forth a method of computation by which a specific discharge might be determined for general application in the Permit Program, either as the equivalent of secondary treatment or as a best available treatment. The complexities of such determinations, together with the infinite variations from case to case, indicate that the establishment of effluent specifications cannot be reduced to simple formula computation." ^{13/}

^{12/} See, e.g., Leg. Hist. 379 (Section 306 would prevent "the industrial equivalent of legal forum shopping"); Leg. Hist. 263 ("Section 306 would preclude owners . . . from moving their facilities to a location with less stringent water quality control restrictions").

^{13/} Memorandum dated July 15, 1971, Hearings before the Senate Subcommittee on Air and Water Pollution of the Committee on Public Works, 92d Cong., 1st Sess. pp. 1834-1835 (1971) (emphasis added).

As stressed by the Senate Committee, the same difficulty, if not impossibility, of translating available technology into a hard and fast number for all discharges providing equitably for "the infinite variations from case to case" explained Congress' choice of a "plant-by-plant" permit approach for existing sources:

"Unfortunately . . . little has been done to identify for industry the exact meaning, on a plant-by-plant basis, of the equivalent of secondary treatment. Through the permit program established under Section 402, with the help of those States which have effective programs, the Administrator and the States can and should . . . be able to apply specific effluent limitations for each industrial source." S. Rep. No. 92-414, 92d Cong., 1st Sess. 44 (1971); Leg. Hist. 1462 (emphasis added).

In short, Congress envisioned individual permits containing "specific effluent limitations for each industrial source" as the rational way to "account" for the "infinite variations from case to case" for existing sources, and to achieve evenhanded treatment for plants of widely varying circumstances in each industrial category.

As the mechanism to achieve this flexible treatment, Congress chose a two-phase program to upgrade control technology for existing sources to the rough equivalent of that available to new sources, through "guidelines" to be utilized by permit issuance authorities in setting individual plant "effluent limitations."

- B. Congress Set Goals "To Be Achieved" by Phased Introduction of Technology Defined by Flexible "Guidelines for Effluent Limitations," Identifying a "Range" of Attainable Discharge Levels, and Specifying Factors "To Be Taken into Account" in Tailoring Effluent Limitations for Each Existing Source.
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Under Section 101(a)(1) of the Act, Congress set "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."

As a first step toward accomplishing this goal, Congress mandated Section 306 standards of performance "to preclude the construction of new sources . . . which use less than the best available control technology for the reduction or elimination of the discharge of pollutants" H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 110 (1972); Leg. Hist. 797 (emphasis added).

For existing sources, Congress announced under Section 301(b) a separate, "two-phase program" so that pollution control for plants currently in place could be upgraded on an orderly and equitable basis. S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971); Leg. Hist. 1460.

Specifically, Section 301(b) provides that "to carry out the objective of this Act there shall be achieved" by July 1, 1977 "effluent limitations . . . which shall require application of the best practicable control technology currently available," and by July 1, 1983 "effluent limitations . . . which shall require application of the best available technology economically achievable."

In contrast to the new source standard regulations expressly prescribed by Section 306, Section 301 does not provide for the issuance of any regulations.^{14/}

Rather, the technology described for 1977 and 1983 respectively is to be "defined by the Administrator pursuant to Section 304(b)," and "to be achieved" under the Section 301 statutory timetable by "effluent limitations" set in individual discharge permits.

Accordingly, the "regulations, providing guidelines for effluent limitations" under Section 304(b) are the focal point for implementation of the statutory control plan for existing source pollution. It is to the specific requirements of these regulations which we now turn.

14/ As a variation of NRDC's argument that "effluent limitation guidelines" amount to "uniform national effluent limitation standards," EPA argues that, wholly apart from Section 304, EPA is authorized to issue binding national effluent limitations under Section 301 (EPA Supp. Br. 6-7); E. I. Dupont de Nemours v. Train, Civ. No. 74-57 (W.D. Va. 1974); American Paper Institute v. Train, Civ. No. 74-814 (D.D.C. 1974).

The issue in both cited cases was whether the district court, rather than the Court of Appeals, had jurisdiction to review "effluent limitations guidelines." Whether or not the Dupont court's interpretation of Section 301 is dictum, its statutory analysis only underscores the absence of EPA authority to issue national standards for existing sources, since the district court purports to find such authority by strained resort to the judicial review provision, Section 509, and the citizen suit provision, Section 505.

1. Under Section 304(b), EPA Is Required to Define Technology for Phased Inclusion in All Existing Plants by 1977 and 1983.

The "general objectives" and "specific time deadlines" of Section 301 are "to be achieved" by "guidelines for effluent limitations" ultimately established and "implemented through permits issued in Section 402." Leg. Hist. 1283; S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971); Leg. Hist. 1460. As the Senate Committee put it:

"Subsection (b) of [Section 304] requires the Administrator within one year after enactment to publish guidelines for setting effluent limitations reflecting the mandate of Section 301, which will be imposed as conditions of permits issued under Section 402" Id. 51, Leg. Hist. 1469 (emphasis added).

Although Congress left the job of actually defining technology to the Administrator, it provided a blueprint in the statute and legislative history prescribing what EPA should consider and what should be accomplished by 1977 and 1983 respectively.

To begin with, Congress listed in the statute a host of "factors," reflecting Congress' understanding of the variables which might affect the pollution control performance and capabilities of existing plants, and mandated that "all such factors" be given "specific and detailed consideration" on an "industry-wide basis" by the Administrator. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 101, 107 (1972); Leg. Hist. 788, 794; Leg. Hist. 145.

Over and above these statutory "factors," Congress pointed generally to the levels of technology to be phased into existing plants by 1977 and 1983.

During the first phase, Congress directed EPA to upgrade all existing plants to a "base level" representing the "average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category" S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Leg. Hist. 1468 (emphasis added). By thus bringing industry technological laggards at least up to a "base level" of the average of best plants "currently in place," Congress hoped to optimize industry's capability for further technological pollution control progress by 1983. (Id.) (emphasis added).

It was in the second, 1977-1983 phase that Congress expected the most significant strides toward the ultimate statutory goal of elimination of the discharge of pollutants by 1985.^{15/} For during the latter part of the ten-year period from enactment to 1983, the options available to existing plants would be greatly expanded to include even many of the "improved production processes" and other changes currently available only to new plants.^{16/}

^{15/} Congress envisioned "no radical change" by 1977 but contemplated that, "[i]n determining the degree of effluent reduction to be achieved for a category or class of sources by 1983, the Administrator may consider a broad range of technological alternatives" Leg. Hist. 170, 172 (emphasis added).

^{16/} Senator Muskie stressed much the same point in his remarks during debate on the House-Senate Conference Report:

"Through research and development of new processes, modifications, replacement of obsolete plans and processes, and other improvements in technology, it is anticipated that it should be possible, taking into account the cost of controls, to achieve by 1983 levels of control which approach and achieve the elimination of discharge of pollutants" Leg. Hist. 170 (emphasis added).

Reflecting such enhanced capabilities for existing plants by 1983, Congress directed that the "reference" for defining phase two technology should approximate "the best performer in any industrial category" Leg. Hist. 170 (emphasis added). To underscore the general equivalence of this technology with that available to new plants, Congress stressed that 1983 technology was "intended to be the top-of-the-line of current technology, subject to limitations imposed by economic feasibility, and economic, social and environmental impact" H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 108 (1972); Leg. Hist. 795 (emphasis added).

Consistent with the Act's aim of placing pollution control levels for new and existing plants roughly on a par by 1983, Congress took special pains to guard against premature implementation of costly technology in 1977, not justified by the marginal, interim pollution reduction benefits that might accompany forced introduction of unproven technology and costly plant changes ahead of the statutory schedule.^{17/}

Thus, by an express cost-benefit requirement, EPA must weigh "the total cost of application of technology in relation to the effluent reduction benefits to be achieved," Section 304(b) (1) (B).

^{17/} Cf. International Harvester Co. v. Ruckelshaus, 478 F.2d 633-635 (D.C. Cir. 1973) ("small" interim environmental benefits of denying one-year suspension outweighed by economic and other costs of early implementation of motor vehicle emission standards.

This provision confirms Congress' disclaimer of procrustean national standards for industries like petroleum refining where, due to the uniqueness of each existing refinery, the high cost of crash-basis introduction of "across-the-board requirements," including major in-plant and process changes, far outweigh any marginal interim pollution control benefits from telescoping the 1983 statutory deadline back to 1977.

Above all, however, the two-phased progress directed by Congress, first to a "base level" of average plants "currently in place" and ultimately to "top-of-the-line" current technology roughly equivalent to new sources, underscores the need for flexible guidance and information, allowing permit issuance authorities to optimize pollution control progress for each plant, while preserving equitable and evenhanded treatment among the facilities in each industrial category.

2. For 1977 and 1983 Technology Defined by the Administrator, Congress Directed EPA to "Identify" a "Range" of Attainable Discharge Levels and to "Specify Factors to Be Taken into Account" in Setting Effluent Limitations for Each Existing Plant.

Although the requisite 1977 and 1983 technologies are initially "defined" by the Administrator, actual "determination" of best practicable control technology must be made individually as to each plant."^{18/} Such determinations

^{18/} Address of John R. Quarles, Jr., formerly EPA Assistant Administrator for Enforcement and General Counsel, now Deputy Administrator, before American Bar Association National Institute, October 26, 1972 (emphasis added). See Part II-A, infra, p. 35, for full text of Quarles quote together with other early EPA interpretations of the statutory plan. -

of technology for each plant are to be accomplished, not by directions to include specific pollution control hardware or to make particular plant modifications, but by "effluent limitations . . . established and applied to all point sources of discharges covered by the Act by means of the permits issued under Title IV."^{19/}

"Guidelines" are the means by which "the Administrator will interpret the term 'best practicable'. . . as a basis for specifying clear and precise effluent limitations" to be "included as conditions in permits issued under Section 402 based on the time elements of Section 301 and the guidelines of Section 304" Leg. Hist. 169, 171 (emphasis added).

Therefore, the intended purpose of "guidelines for effluent limitations" is, as the term itself says, to provide "information" and "guidelines" for State and EPA regional officials to utilize in establishing and applying effluent limitations "individually as to each plant" by "means of permits issued" under Section 402. See H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 158 (1972), Leg. Hist. 845 (referring to the "information requirements" of Section 304(b)).

As a first step in providing such "information," the Administrator is required under Section 304(b) to "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through application" of the respective 1977 and 1983 technologies. (Emphasis added).

Congress' careful selection of the terms "identify" and "degree" not only reiterates the statutory disclaimer of rigid

^{19/} Letter of Administrator Ruckelshaus, December 13, 1971; H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 157 (1972), Leg. Hist. 844 (emphasis added).

existing source standards, but also emphasizes that the Administrator is to set a "range" of attainable discharge levels for the information and use of permit issuance authorities in fashioning effluent limitations for particular existing plants. As the Senate Committee interpreted this statutory directive:

"In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels above a certain base level applicable to all plants within that category" S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Leg. Hist. 1468 (emphasis added). 20/

Congress perceived that, in selecting from the "range" of discharge levels identified by EPA, the Federal or State permit issuance authority would need to take into account a large number of varying factors to tailor effluent limitations to the specific circumstances of an individual plant.

At the same time, Congress was aware that the most important such factors (including plant age, processes, inputs, process types, geographic and climatic circumstances, engineering problems and the like) would vary from industry to industry, and also within each industrial category.

For this reason, Section 304(b) directs that, for each industrial category, the Administrator "specify factors to be taken into account in determining the control measures and practices to be applicable [in 1977] . . . and the best measures and practices available to comply [in 1983]."

Once again, the terms employed by Congress were carefully chosen. For the draftsmen purposely employed the

20/ Accord, Remarks of Senator Muskie in Senate debate over the House-Senate Conference Report:

"Also, rather than establishing the range of levels in reference to the average of the best performers in an industrial category, the range [for 1983] should, at a minimum, be established with reference to the best performer in any industrial category" Leg. Hist. 170 (emphasis added).

future tense, "to be taken into account," as a means of emphasizing that the Administrator was to "specify factors" for future use by permit writers in determining technology and setting allowable discharge levels for discrete existing plants within the industrial category.

The legislative history confirms that the "factors" specified by EPA must be separately considered when establishing and applying effluent limitations in permits. For example, in summarizing this statutory requirement, the Senate Committee said:

"In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant" Id. (emphasis added).

Similarly, Representative Clausen, a Manager on the Part of the House, pointed to the same requirement in explaining that effluent limitations for similar plants would be similar "if the applicable factors . . . were the same in each plant" Leg. Hist. 21/ 378 (emphasis added).

21/ Accord, Remarks of Senator Muskie in Senate debate on the House-Senate Conference Report:

"The Administrator is expected to be precise in his guidelines to assure that similar point sources with similar characteristics . . . will meet similar effluent limitations" Leg. Hist. 172 (emphasis added).

A consideration which need not be analyzed on a plant-by-plant basis, in light of the special cost-benefit provisions of Section 304(b)(1)(B), is the total cost and overall economic impact, as distinguished from the discrete cost of applying technology to an individual plant. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 121 (1972); Leg. Hist. 304; Leg. Hist. 255.

The Conference Committee's disfavor of "plant-by-plant" economic cost-benefit analyses highlights, however, Congress' overriding intent that the "factors" specified by EPA under Section 304(b) be individually applied and "taken into account" in specific plant discharge permits.

Taken together, the coordinated requirements that EPA "identify" a "range" of attainable discharge levels and "specify factors to be taken into account" by permit issuance authorities provides a workable mechanism to guarantee the flexibility needed both for optimal pollution control progress by each existing plant and evenhanded treatment among the diverse existing plants within each industrial category.

3. Rigid, National Standards for Existing Sources Would Nullify Congress' Express Delegation of Permit Issuance Authority to the States, and Vitiates the Pragmatic and Flexible State/Federal Permit Program.

The individual plant control of existing sources intended by Congress, already manifest from the statutory text and legislative history discussed above, is conclusively confirmed by the Act's transfer of permit authority to the States subject to statutory permit-by-permit administrative and judicial review.

As set forth in Section 101(b) of the Act, "[i]t is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution . . ." (emphasis added). In line with the States' "primary" water pollution control "responsibilities," Congress "expected that the States would play a major role in the administration" of the permit program. S. Rep. No. 92-414, 92d Cong., 1st Sess. 71 (1971), Leg. Hist. 1489 (emphasis added).

Accordingly, Section 402(a)(5) requires EPA to "authorize a State . . . to issue permits for discharges . . . within

[its] jurisdiction" as soon as the State has "the capability of administering a permit program."

By this provision, Congress intended an "orderly transfer of permit authority from the Environmental Protection Agency to the States" as "rapidly as they develop approved programs" Leg. Hist. 363, 1305 (emphasis added).

The purpose of this "orderly transfer of permit authority" for States "to do the job" by taking "primary responsibility" for utilizing the Section 304(b) guidelines to set effluent limitations in individual discharge permits. Leg. Hist. 234, 356. This purpose was succinctly summarized by Representative Blatnik, Chairman of the Public Works Committee, responsible for the House bill:

"H.R. 11896 provides for state and local participation; let us give them the chance to do the job. This bill will provide the resources and direction they have not had in the past" Leg. Hist. 356 (emphasis added). 22/

Plainly, the States' "primary responsibility" to "do the job" under the permit program would be vitiated by rigid national discharge standards to be cranked mechanically into existing source permits. Indeed, the House Committee warned against just such Federal "usurpation":

22/ Representative Wright, a Conference Committee member and co-sponsor of the House bill, also stressed Congress' conviction that "State and local interest, initiative and personnel [would] provide a much more effective program than that which would result from control in the regional offices of the Environmental Protection Agency" Leg. Hist. 262 (emphasis added). See Sections 303(e)(2)&(3) (providing, as a prerequisite to approval of State permit program, State "continuing planning process," among other things, to permit development of "effluent limitations and schedules of compliance").

"It is impossible for the Federal government to succeed in this program without the close and active cooperation of the States. A system of permits which requires duplicative effort or destroys the initiative of the States or local governments is wasteful and non-productive" H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 125 (1972), Leg. Hist. 812 (emphasis added).

In short, the issuance of nationwide, existing source discharge standards not only flouts the Congressional plan for flexible "guidelines" but also destroys State "initiative," thereby nullifying the State/Federal permit program and rendering meaningless the permit-by-permit administrative and judicial review guaranteed by Sections 402(d) and 509(b) (1) (F).^{23/}

II. DESPITE PRIOR INTERPRETATIONS BY EPA ITSELF RECOGNIZING CONTROL OF EXISTING SOURCES THROUGH FLEXIBLE "GUIDELINES," EPA THEN UNLAWFULLY JETTISONED THE STATUTORY PLAN BY HASTY PUBLICATION OF PROCRUSTEAN, NATIONWIDE DISCHARGE STANDARDS FOR EXISTING SOURCES.

As we have demonstrated, Congress deliberately established entirely different regulatory schemes for new and for existing sources in view of the many more pollution control "options" available to new plants and the greater, and highly variable, costs of "retrofitting" existing plants.

In contrast to the firm national "standards of performance" mandated for new plants, Congress adopted a phased program to upgrade pollution control for existing plants by flexible "guidelines for setting effluent limitations" on a "plant-by-plant" basis in separate plant discharge permits for individual plants based on sound technical judgment.

^{23/} See 40 C.F.R. Part 125, as amended, 39 Fed. Reg. 27078 (July 24, 1974), setting forth EPA's procedures for administrative review and appeal of individual permits.

EPA was directed in such "guidelines" to aid State and EPA regional permit writers by providing "information" identifying a "range" of attainable discharge levels and specifying "factors to be taken into account" in selecting specific plant discharge levels.

Far from being a novel statutory construction, this is the interpretation largely followed by EPA itself until shortly before NRDC filed suit and obtained the court order under review here, compelling EPA to publish "effluent limitations guidelines" for categories covering all point sources on a tight judicial schedule.

- A. In the Face of Approaching Statutory Deadlines, Mounting Backlogs of Unissued Permits, and the Pressures of This Lawsuit, EPA Abandoned Its Own Pragmatic Construction of the Act and Fell into the Expedient and Unlawful Publication of Nationwide Existing Source Standards.

From EPA's earliest experience under the previous Refuse Act permit program until long after passage of the 1972 Amendments, EPA acknowledged the "infinite variations from case to case" for existing sources and the necessity of tailoring effluent limitations to the circumstances of "specific plants."

As summarized in the following assessment of the Refuse Act permit program submitted to the Senate Subcommittee on Air and Water Pollution, no set of existing source standards can substitute for the "careful exercise of professional judgment":

"The complexities of such determinations, together with the infinite variations from case to case, indicate that the establishment of effluent specifications cannot be reduced to simple formula computation.

* * *

"The effluent computation formulas which will be furnished to you, when available, may be used to supplement existing techniques for establishment of effluent specifications. They will provide a quick method to determine whether proposed specifications are within a normal range but will not reduce the need for careful exercise of professional judgment." 24/

Consistent with this assessment of the Refuse Act permit program, EPA supported legislation calling for the issuance of "regulations providing specifications for effluent limitations" to be used in a State/Federal water quality permit program. 25/

The purpose of this "Federal guidance" was explained by EPA Administrator Ruckelshaus to the Senate Air and Water Pollution Subcommittee:

"We believe that such Federal guidance is especially important in the area of effluent limitations. This concept is new in the law. It would be difficult and needlessly duplicative for each State to gather all the scientific, industrial, and technological information upon which effluent limitations must be based. Federal leadership must be provided here so that the States, in setting effluent limitations, have a clear idea of the task." 26/

24/ Memorandum, John R. Quarles, Jr., Assistant Administrator and General Counsel, July 1, 1971, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, pp. 1834-35 (1971) (emphasis added).

25/ S. 1014, Section 10(d)(4), 92d Cong., 1st Sess. 1971, reprinted in Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, pp. 307, 311 (1971).

26/ Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, p. 19 (1971) (emphasis added).

When Congress opted for a more direct permit program to upgrade existing plant control technology, the "Federal guidance" espoused by EPA was retained. Therefore, in explaining the Act recently passed by Congress, Administrator Ruckelshaus stressed once again that:

"[E]very plant involves individual factors which differentiate it from others and directly affect what would be the best practicable control technology for that plant. EPA's guidelines will provide the most comprehensive effort ever made on a national basis to provide information with respect to industrial waste control technology. However, to do the job on specific plants will take the full-time efforts of hundreds of Federal and State pollution control people, working as a team . . .

"The EPA guidelines . . . will not be the final answer to pollution control questions." 27/

Congress' mandate that permit writers consider "individual factors" for "specific plants" in their "determinations" was confirmed administratively by John R. Quarles, Jr., EPA Assistant Administrator and General Counsel:

"As the legislation has developed in Congress, we have made various efforts to prepare for it. Although the determinations of best practicable technology must be made individually as to each plant, we have already developed a vast amount of guidance to our professional personnel for use in making such determinations." 28/

27/ Remarks of Administrator Ruckelshaus, Annual Meeting of Water Pollution Control Federation (October 11, 1972) (emphasis added). Thereafter, the statute as discussed by the Administrator was enacted without change on October 18, 1972, over the President's veto.

28/ Address of John R. Quarles, Jr. (now EPA Deputy Administrator) before American Bar Association National Institute, October 26, 1972 (emphasis added).

This flexible approach of individual "determinations" for "each plant" was carried out administratively for the petroleum refining industry in the October 1972 "Effluent Limitation Guidance" document, issued to EPA Regional Administrators about the time of passage of the 1972 ^{29/} Amendments.

In this "Guidance" document, EPA actually identified a range of discharge levels between stringent "Attachment A" values, equivalent to what "new refineries should achieve . . . on start up," and far less restrictive "Attachment B" values, representing the "minimum acceptable effluent levels for the Petroleum Refining Industry" (Id. 1). Also, the Guidance document specified factors to be taken into account by permit writers in applying the guidelines to specific plants, provided that "no plant should achieve less pollution reduction than Attachment B values" (Id. 1, 8, 9).

Much the same approach was employed in the subsequent March 1973 "Petroleum Refining Guidance" document. Thus, EPA stressed that "[i]n applying these effluent guidelines, it must be recognized that the costs of achieving incremental improvements in effluent quality and therefore, economic impact, will vary widely among individual refineries." ^{30/}

^{29/} Effluent Limitation Guidance for the Refuse Act Permit Program, Petroleum Refining Industry, October 1972.

^{30/} Petroleum Refining Guidance, March 7, 1973, Division of Permit Programs, p. II-7 (emphasis added).

For this reason, the March 1973 document again specified "factors" to be considered in permits, including the "availability of land," the "types of crude oils" used, the "products" produced, the use of "once-through cooling waters," the relative "refinery complexity," the "refinery age and layout," and the "climate and geographic location" of the refinery. (Id. 7, 8).

Without subscribing to the specifics of the respective Guidance documents, it is plain that EPA's former interpretation of the Act, as well as the control system established administratively, conform much more closely to the Congressional mandate of flexible "guidelines" than do EPA's later so-called "effluent limitations guidelines" which even NRDC refers to as "uniform national effluent discharge standards."

The haunting question of why EPA abandoned in mid-course its early more nearly correct interpretation of the Act is difficult to answer with certainty. However, this much is clear:

Even by March 1973, the date of the last petroleum refining Guidance document, EPA's resolve to follow the statutory plan had begun to weaken. For by that time, EPA was literally buried under thousands of permit applications, virtually none of which had issued.

Also, the process of formulating the enormous number of regulations required by the Act was going so slowly that EPA conceded that "effluent limitations guidelines" for only a few industries would be published

by the October 18, 1973 statutory deadline. (NRDC Br. 15).

Thereafter, the pressures on EPA mounted -- first by NRDC's letter threatening legal action and then by NRDC's August 14, 1973 lawsuit, challenging EPA's implementation of the Section 304(b) "guidelines" program. (Id. 16). Still, the October 18, 1973 statutory deadline passed "without publication of a single effluent guideline under Section 304" (Id. 18).

Then, on November 15, 1973, Judge Green granted declaratory judgment for NRDC. Without apparent perception of the far-reaching consequences for EPA, Judge Green, on November 27, 1973, entered an order compelling EPA to publish industry-by-industry guidelines "at approximately one-week intervals extending from January 15, 1974 through November 29, 1974" (Id. 19-21).

Strangled by this judicial timetable, and with the backlog of unissued permits mounting daily, EPA finally quit all pretense of complying with the Congressional plan for controlling existing sources through flexible "guidelines."

It was against this background that EPA finally published its "Proposed Effluent Limitation Guidelines and New Source Standards" for the Petroleum Refining Point Source Category on December 14, 1973. 38 Fed. Reg. 34542.

These proposed regulations (like those issued shortly before or after for other industrial categories) set forth an identical regulatory format for new and existing sources, thereby obliterating the Congressional distinction between "standards" and "guidelines" and lumping both new and existing sources together under a common regulatory scheme of rigid, across-the-board discharge standards.

The inequity and scientific invalidity of this EPA approach, as well as the practicality of the statutory "guidelines," has been confirmed by the Effluent Standards and Water Quality Information Advisory Committee ("ES&WQIAC"), chartered under Section 515, to oversee EPA's development of "guidelines."

Specifically, ES&WQIAC has characterized EPA's so-called "effluent limitations guidelines" as "arbitrarily established inflexible standards" which give "little consideration to great differences in individual facilities among generic industries with regard to raw waste load, size of plant, age and type of process equipment now operating in a given plant, and climatic and geographic location factors."^{31/} Echoing the legislative history, the Committee

^{31/} BNA Environmental Reporter Current Developments, p. 855 (September 28, 1973) (emphasis added).

Comparable to National Academy of Sciences (NAS) evaluations under the Clean Air Act, ES&WQIAC was created to "assess and evaluate scientific and technical information on effluent standards and limitations under the Act." Section 515 (a) (2). Cf. International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

recommended "rather than set one number as an effluent limitation to be met by all plants within an industry, guidelines should establish a range of limits . . ."
Id. p. 1841 (March 8, 1974) (emphasis added).

In short, EPA's petroleum refining and similar regulations are the unlawful creations of expediency that do not square even with EPA's own former interpretations of the Act -- which at least recognize that the "individual factors which differentiate" each plant must be taken into account by separate "determinations of best practicable control technology . . . made individually as to each plant."

Thereafter, the mounting backlog of undecided permit applications, and Judge Green's tight judicial timetable for issuing "effluent limitations guidelines," forced EPA into the expedient issuance of rigid existing source regulations. For, superficially, such regulations not only meet Judge Green's deadline, but also, by providing unvarying discharge numbers, at least appear to simplify the job of issuing permits for each individual plant.

B. EPA's Belated "Variance Clause" Cannot Lawfully Simulate the Flexibility Mandated by Congress, or Cure EPA's Unlawful Adoption of Rigid National Discharge Standards for Existing Sources.

The final petroleum refining regulations, issued May 9, 1974, retain the proposed regulations' identical format for new and existing sources, thus underscoring once again EPA's erasure of the Congressional demarcation between "standards" and "guidelines" and the merger of both new and existing sources under a single regulatory umbrella of across-the-board discharge standards. 39 Fed. Reg. 16560.

EPA's "final" May 9, 1974 regulations, however, purport to tack on a so-called "variance clause," as a belated simulation of the flexibility mandated by statutory "guidelines for effluent limitations." The artificial flexibility of this spurious "variance clause," apparent from the belated circumstances of its issuance, was highlighted in oral argument when EPA counsel could not even recall the clause until reminded by co-counsel.

As briefed to this Court by EPA, this "variance clause" apparently does not purport to provide real relief, but instead prescribes that all permits must incorporate the discharge number in the "guideline" except that "[i]f a particular facility can appropriately be restricted to a smaller discharge than the guideline provides, the permit will require a lesser amount" (EPA Supp. Br. 6) (emphasis added).

The futile inadequacy of this "one-way street," allowing only smaller, not larger, discharge numbers, is clear from previous discussion. For if the widely varying circumstances of individual existing plants are ever to be given the flexible consideration intended by Congress, permit issuance authorities must surely have unquestioned authority to select either smaller or larger discharge numbers from a range of discharge levels identified in "guidelines" based on a technically sound evaluation of the facts defining each plant.

But even if EPA's so-called "variance clause" were interpreted as a two-way street, its provisions, when compared to the pragmatic "guidelines" mandated by Congress, are woefully deficient.

To begin with, the clause is identical for all industries, thereby underlining EPA's failure as required by the Act to "specify factors to be taken into account" within each industrial category for utilization by permit issuance authorities in setting individual plant effluent limitations.

Moreover, the clause by its own terms apparently applies only in 1977 to "factors . . . fundamentally different from the factors considered in the establishment of the guidelines" 39 Fed. Reg. 16560, 16564 (emphasis added). This condition would seem to bar individual plant consideration of widely varying age, process and other factors purportedly taken into account by EPA in formulating "effluent limitations guidelines."

Also, the same provision has already been

interpreted by EPA to proscribe specific plant consideration of the widely varying costs of introducing 1977 technology in specific plants, even though this factor was recognized as a critical variable in EPA's previous "Guidance" documents for the petroleum refining industry. 39 Fed. Reg. 30073 (August 20, 1974).

In short, the transparent purpose of EPA's so-called "variance clause" is not to provide the realistic relief mandated by the statutory "guidelines for effluent limitations," but to simulate flexibility where none exists so as to shore up EPA's untenable legal position in pending litigation.

The fundamental expediency of EPA's simulated flexibility is paradoxically revealed by EPA's position before the Court. For, despite the rigidity of its existing source standards, EPA concedes that individual permits can be drafted by taking into account the widely varying circumstances of each plant without producing "less vigorous restrictions" or less pollution control progress. (EPA Supp. Br. 2) (emphasis added).

But if, as EPA admits, individual consideration of each plant "neither impedes the issuance of Section 402 discharge permits nor leads to less vigorous restrictions on discharge of effluent," then plainly, across-the-board standards for existing sources are wholly unnecessary.

Rather, the flexibility intended by Congress both must and should be accomplished by the statutory "guidelines," not simulated by an artificial "variance clause" (Id.) (emphasis added).

We can readily understand and sympathize with EPA's dilemma in view of the enormous burden placed upon it by Judge Green's timetable and other provisions of the Act. Also, outside the categories expressly listed in Section 306, there may well be industries where the time involved in preparing guidelines outweighs their value to permit issuance authorities in tailoring effluent limitations for individual plants.

But the accompanying need to devote EPA staff resources to consider each plant in industries where guidelines are not "possible or appropriate" cannot excuse or legalize EPA's attempt to shortcut the statutory "guideline" plan and the individual plant permit process in major industries, such as petroleum refining, by issuance of rigid, across-the-board standards applicable to all existing plants on a nationwide basis.

CONCLUSION

As we have demonstrated, Congress, in recognition of the many more and diverse pollution control "options" available to new plants, and the greater and highly variable costs of "retrofitting" existing plants, deliberately established complementary regulatory schemes of fixed, national standards for new sources, and flexible "guidelines" to be utilized "for setting effluent limitations" for existing sources under the State/Federal permit program.

Despite EPA's own earlier interpretations acknowledging these separate new and existing source schemes, EPA, in its desperate response to approaching statutory deadlines, mounting backlogs of undecided permit applications, and the pressures of this lawsuit, then unlawfully erased the Congressional distinction between new and existing sources, by adopting what the scientific watchdog committee has called "arbitrarily established inflexible standards" for all plants on a nationwide basis.

It is critical not only to the petroleum refining industry and other industries but also to the public in general, who will pay for the accompanying economic and social dislocations resulting from procrustean, national existing source standards, that this unlawful disregard of the statutory plan be redressed at the earliest possible moment.

Accordingly, in view of the rapidly approaching December 31, 1974 statutory date and the overriding public interest in prompt remedial action, API respectfully suggests the following practical steps to guarantee that EPA comply with the letter and spirit of the Congressional plan for flexible statutory "guidelines" as detailed above:

First, the Court should reassess its October 3, 1974 Memorandum Opinion and validate EPA's discretion to forego issuance of "guidelines for effluent limitations" for those industries not specified in Section 306.

Second, the Court should order EPA to interpret and implement outstanding existing source regulations as flexible "guidelines for effluent limitations" consistent with the Congressional plan and intent. As soon as practicable thereafter, EPA should make available information for each category, translating the discharge levels in outstanding regulations into a range of attainable values, and specifying the most important factors which permit issuance authorities should consider in setting individual plant effluent limitations.

Finally, the Court should recognize that the provisions of many permits will inevitably be contested in both administrative and judicial review proceedings authorized under Section 509(b) (1) (F).

Accordingly, the Court should clarify that the statutory December 31, 1974 deadline governs provisional EPA or State issuance of permits, to be followed thereafter by administrative and judicial review of any contested portions of permits, with enforcement actions for contested portions only deferred during the pendency of review.

Of Counsel:

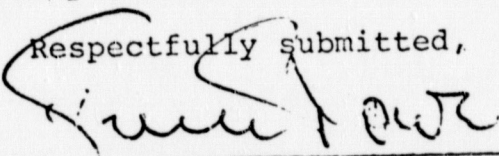
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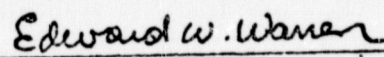
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December 6, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have on this 6th day of December, 1974, caused service to be made of the Amicus Curiae Brief of the American Petroleum Institute and Eleven Member Companies, dated December 6, 1974, in Train v. NRDC, No. 74-1433, by having a copy placed in the United States mail, postage prepaid and properly addressed, to Lawrence F. Shearer, Esq., Department of Justice, Room 2338, 10th and Pennsylvania Avenue, N.W., Washington, D. C. 20530, and to Edward L. Strohbehn, Esq., Natural Resources Defense Council, Inc., 1710 N Street, N.W., Washington, D. C. 20036.

Edward W. Warren

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APPENDIX

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November 18, 1974

Philip B. Wisman
EPA Information Center
Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Re: Proposed Amendments, Petroleum Refining
Effluent Limitations Guidelines and
Standards of Performance

Dear Mr. Wisman:

The attached Comments of the American Petroleum Institute ("API") are submitted in response to the "Proposed Effluent Limitations and Guidelines" for the Petroleum Refining Point Source Category published October 17, 1974, 39 Fed. Reg. 37069.

As this letter and the attached Comments show, EPA has, contrary to the provisions of the Federal Water Pollution Control Act ("the Act"), issued rigid, effluent discharge standards rather than flexible "guidelines for effluent limitations" to be utilized on a "plant-by-plant" basis in permits for existing point sources.

Moreover, EPA's regulations are improperly based on technology for 1977 which is neither "practicable" nor "currently available," and on technology and processes for 1983 and for new sources which are neither "demonstrated," "available" nor "economically achievable" within the contemplation of the Act.

Accordingly, EPA should withdraw the challenged regulations and promulgate new regulations, providing flexible 1977 and 1983 "guidelines" for existing sources, and standards of performance for new sources which reflect "specific and detailed" consideration of all statutory "factors" and satisfy the Act's technology definitions.

INTRODUCTION

The American Petroleum Institute and ten member companies are Petitioners in API, et al. v. EPA, et al., Nos. 74-1465, 74-1466 (10th Cir., August 7, 1974), challenging the so-called petroleum refinery "effluent limitations guidelines" and "standards of performance" published May 9, 1974, 39 Fed. Reg. 16560. */

On September 30, 1974, the day on which EPA was due to file the appellate record, Respondent EPA moved for a ninety-day stay of judicial review to permit publication and consideration of proposed amendments to the May 9, 1974 regulations. Ten days later, API and member company Petitioners responded that the proceeding should be remanded for EPA "to reconsider the challenged regulations in light of all of the comments, data and information submitted by Petitioners." **/

Thereafter, on October 17, 1974, EPA published proposed amendments to the petroleum refining "effluent limitations guidelines" and "standards of performance."

The proposed statements admit that "the ranges used in preparing the size and process factors" for each petroleum refining subcategory "were too broad." Accordingly, the proposed amendments reduce the range sizes so that "the change in allocation [from one configuration step to the next] will be only 10-15 percent in most cases." 39 Fed. Reg. 37069.

In the Notice of Proposed Rulemaking, EPA solicited comments on "all aspects of the proposed regulation," as well as comments which "address the approach taken by the Agency in establishing [any] effluent limitations guideline or standard of performance." Id.

SCOPE OF API'S COMMENTS

While API generally supports the proposed changes in the size and process configuration tables, serious inequities remain for some refineries even under the amended tables.

*/ API and eleven member companies have also challenged these regulations in the United States District Court for the District of Colorado, API, et al. v. Train, No. 74-F-864.

**/ The Tenth Circuit Court of Appeals has not yet ruled upon EPA's Motion to Stay Judicial Review and Petitioners' Response thereto.

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Moreover, the proposed changes have done little to cure the critical, interrelated legal and technical defects in the petroleum refining "effluent limitations guidelines" and "standards of performance" challenged by API and member company Petitioners in the Tenth Circuit Court of Appeals.

Therefore, API's Comments address broadly the May 9, 1974 regulations in light of and including the proposed amendments.

Previous comments and submissions by API and member companies, both before and after May 9, 1974, have detailed many deficiencies in the petroleum refining "effluent limitations guidelines" and "standards of performance," which need not be reiterated here. */

Instead, API's Comments provide new analyses and information regarding selected issues illustrative of the unsound approach taken by EPA in the May 9, 1974 regulations.

Even with regard to these selected issues, however, it has been impossible to catalog comprehensively all of the many errors within the short, thirty-day comment period provided. Until October 1974, API was denied access to the critically important data and information contained in Supplement B to the petroleum refining Development Document.

Despite major portions of Supplement B now available, it has still taken engineers and other technical personnel at API and member companies literally weeks to partially reconstruct and tentatively understand the purported derivations of the May 9, 1974 regulations. Moreover, even now, many vital documents necessary to a full understanding of EPA's regulations remain unavailable. **/

*/ Following the publication of the May 9, 1974 regulations, API and various member companies submitted comments and information critical of the final regulations. We trust that these submissions, together with relevant filings before and by ES&WQIAC, will be included in the Tenth Circuit appellate record.

**/ On October 29, 1974, counsel for API made a formal request under the Freedom of Information Act for additional, specifically identified documents. EPA provided a partial response to this request on November 13, 1974, but other portions of API's request remain outstanding.

On November 15, 1974, API submitted an additional request for documents missing from Supplement B and for further information claimed by EPA to support the challenged regulations.

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Under the circumstances, API's Comments necessarily constitute only a preliminary appraisal to be supplemented by additional information and analysis presented to EPA and the courts.

A. EPA'S STATUTORY DUTY TO ISSUE "GUIDELINES"
TO BE UTILIZED ON A "PLANT-BY-PLANT" BASIS
IN PERMITS

API has consistently maintained that Congress deliberately established entirely different regulatory schemes for new and existing point discharge sources under the Federal Water Pollution Control Act Amendments. */

For new sources, Congress mandated rigid "standards" of performance" designed to be "national" in scope. Administrator Train, then Chairman of the Council on Environmental Quality, explained the justification for "across-the-board" standards for new plants as follows:

"Across-the board requirements can be justified for new plants, since they have many options in terms of processes, inputs, and the like, which is not the case for existing facilities." **/

By contrast, Congress recognized the greater, and highly variable, costs for "retrofitting" existing plants due to the diverse "processes" employed, the differing "age of equipment and facilities" and other factors varying on a "plant-by-plant" basis. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 110 (1972); S. Rep. No. 92-414, 92d Cong., 1st Sess. 44 (1971).

Accordingly, Congress directed EPA to control existing source pollution, not by across-the-board "standards" like those applicable to new sources, but by "regulations, providing guidelines for effluent limitations." Such "guidelines" are to be

*/ See, e.g., API Comments re Variance Procedures in Effluent Guidelines and Standards, September 26, 1974; Docketing Statements, API, et al. v. EPA, et al., Nos. 74-1465, 74-1466 (September 16, 1974, 10th Cir.); Motion for Leave to File an Amicus Curiae Brief, National Resources Defense Council, Inc. v. Fri, No. 74-1433 (October 4, 1974, D. C. Cir.).

API will soon brief this position to the D. C. Circuit pursuant to the Court's November 12, 1974 order granting API's Motion for Leave to File an Amicus Curiae Brief.

**/ Testimony before the House Public Works Committee, December 7, 1971, p. 201 (emphasis added).

utilized by the States and EPA Regional Administrators "to apply specific effluent limitations for each industrial source" on a "plant-by-plant basis" through "the permit program under section 402." S. Rep. 92-414, 92d Cong., 1st Sess. 44 (1971) (emphasis added).

Rather than establishing "a range of discharge levels" for existing sources by flexible "guidelines," EPA has obliterated the Congressional distinction between "standards" and "guidelines" by lumping new and existing sources together under a common regulatory system of rigid, across-the-board discharge standards.

On this ground alone, EPA's May 9, 1974 regulations are fatally defective and must be rewritten to allow the "plant-by-plant" flexibility in discharge permits plainly intended by Congress.

B. EPA'S FAILURE TO DISCLOSE AND EXPLICATE THE BASIS AND DERIVATION OF THE MAY 9, 1974 REGULATIONS

Even if EPA were empowered to publish across-the-board standards for existing discharge sources, which it clearly is not, the Agency must fully disclose the basis for its standards and clearly explicate their derivation. */

As the attached API Comments detail, EPA has consistently failed to meet this requirement in the May 9, 1974 regulations. To take just a few of the most obvious examples:

- (1) Nowhere do either the regulations or the Development Document disclose or explain the criteria employed by the engineering contractor or EPA for selecting the thirty candidate refineries for "exemplary" plant treatment. **/

*/ See Dry Color Mfrs. Ass'n, Inc. v. Brennan, 486 F.2d 98, 106 (3d Cir. 1973) (inadequate articulation of reasons "places too great a burden on interested persons to challenge the basis for the standard"); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (stressing the requirement that EPA fully disclose the data underlying portland cement emission standards of performance); International Harvester v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) (placing the burden on EPA to explain and support the methodology predicting that the requisite emission control technology was available to meet the 1975 automobile emission standards).

**/ Even if such an explanation were disclosed in the contractor's report, which it is not, EPA's duty to explicate the basis of its standards can only be satisfied by the Agency's own regulations and accompanying statement of basis and purpose.

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(2) Nor does EPA explain and justify precisely why and how the thirty candidate refineries were narrowed down to only twelve "exemplary" refineries from which all of the standards and "limitations" are derived.

(3) Similarly, except for a table of values citing references nowhere discussed, EPA fails to explain how the so-called "attainable concentration" levels were derived.

(4) Likewise, for the 1977 calculated flow basis, EPA provides no engineering explanation or justification for its conclusion that all existing refineries can attain the current median flow within each subcategory.

(5) Even more extraordinary, neither the regulations nor the Development Document explain or assess how refineries of widely varying age, processes, geographic location, land availability, and other circumstances can further reduce flow by 1983 to the average of refineries currently meeting the prescribed 1977 flow rates.

This list is far from exhaustive. Indeed, the May 9, 1974 regulations are literally riddled with instances of undisclosed data and unexplained assumptions requiring judicial reversal and remand for reconsideration by the Agency. */

C. EPA FAILED TO DEMONSTRATE THAT "PRACTICABLE CONTROL TECHNOLOGY" IS "CURRENTLY AVAILABLE" TO MEET THE 1977 DISCHARGE LEVELS

Congress was explicit in defining the level of technology required to be met in all plants by 1977. Thus, "guidelines" should establish "the range of best practicable

*/ For an in-depth illustration of smaller, but still important, defects of this kind, one need only study the comprehensive critique of EPA's variability analysis set forth in the attached Comments.

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levels based upon the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category." S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971) (emphasis added).

Absent "uniformly inadequate" practices, therefore, Congress essentially intended that below-average plants be brought up to a 1977 "base level" representing levels of control "currently in place" within each industrial category. Id.

The attached Comments show just how far EPA has departed from this statutory directive in the so-called 1977 petroleum refining "effluent limitations guidelines."

Initially, EPA excluded, from a total universe of 251 refineries, all but approximately 100 refineries (including all refineries with more than 3% once-through cooling water). From this sample of less than 40% of total refineries, the Agency calculated attainable water flow rates for 1977.

The same about 100-refinery sample was, in turn, whittled down to 30 candidate refineries thought to have, not average, but "exemplary raw waste loads and in-plant practices as well as [exemplary] end-of-process treatment systems." */

Based on refinery visits, this 30-plant sample was further reduced to only 12 "exemplary" refineries which, together with selected literature references, provide the entire basis for the 1977 attainable effluent concentration levels.

Standing alone, EPA's biased reliance on only 12 "exemplary" refineries, representing less than 5% of the total number of plants, is a far cry from Congress' intent that 1977 levels be based on the "average" of best "existing" performance by plants "currently in place."

Even more extraordinary, however, the attached API Comments demonstrate that only one of the twelve "exemplary" refineries relied upon by EPA actually complies with the prescribed 1977 levels for every pollutant parameter. And even this single complying refinery, the Sun Oil plant in

*/ Letter to Atlantic Richfield Co. from Roy F. Weston, Inc., February 27, 1973 (contractor's initial letter request for data from refineries).

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Duncan, Oklahoma, is atypical in numerous respects, including use of "sweet" crudes, low in sulfur and other constituents, as well as water conservation measures in the refinery design because of the area's historic water shortage.

By itself, EPA's biased reliance on the performance of a sole refinery meeting the 1977 discharge levels demonstrates conclusively that "practicable" control technology is not "currently available" under the Act.

Over and above this independent ground for invalidating the 1977 regulations, EPA's selection of technology for 1977 violates the Act in further key, specific respects.

1. EPA's Reliance on Proscribed In-Plant Modifications

Congress expressly defined "control technology" for 1977 to mean "treatment facilities at the end of the manufacturing . . . process, rather than control technology within the manufacturing process itself." H.R. Rep. 92-911, 92d Cong., 2d Sess. 100 (1972) (emphasis added). Only in 1983 and for new sources is EPA authorized to look at the "total plant" and to require control techniques beyond those "used at the actual discharge of the point source." Id. at 102.

Nevertheless, EPA ignored the proscription of in-plant modifications for 1977 and arbitrarily directed substantial water conservation measures to reduce flow rates in existing refineries.

As a matter of law, such flow reductions are not required, nor does EPA provide any engineering or other evidence that they can be attained by 1977, especially in older refineries or in plants initially designed, because of climatic or geographic circumstances, for high water usage.

This contravention of Congress' ban on in-plant modifications for 1977 provides another, separate reason why the 1977 regulations are invalid and illegal.

2. EPA's Unauthorized Requirement of Technology beyond the "Equivalent of Secondary Treatment"

Congress intended that the expression "best practicable" be a substitute "for the present terminology 'equivalent of secondary treatment'" for industry" without "limiting

the authority of the Administrator." S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1972). Thus, the processes and overall efficiency of municipal secondary treatment are to serve as a benchmark to be supplemented only by technology which "has demonstrated a reasonable level of engineering and economic confidence in the viability of the process at the time of commencement of actual construction of control facilities." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 101 (1972) (emphasis added).

The end-of-pipe technology and attainable effluent concentrations purportedly derived by EPA for application in 1977 fail to satisfy this test.

To begin with, API's Comments demonstrate that EPA systematically selected attainable concentration levels for each pollutant parameter from the lower range of values reported in engineering and technical literature. The removal efficiencies calculated for each respective parameter are generally in excess of the corresponding efficiencies of municipal plants employing traditional secondary treatment.

These higher control efficiencies derive partially from EPA's inclusion for 1977 not only of biological or activated sludge processes but also further tertiary polishing steps including granular filtration or polishing ponds.

As shown by the attached Comments, even EPA's own publications concede that there is no "carefully documented filter operating experience with wastewater."

This conclusion is confirmed by the operating experience of the two exemplary refineries using granular filtration (Amoco, Yorktown; BP, Marcus Hook).

Accordingly, EPA has impermissibly departed from the "secondary treatment" benchmark and, for this additional reason, its 1977 regulations are unlawful -- wholly apart from EPA's overall failure to show that "practicable" control technology is "currently available" under the Act for existing sources in 1977.

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D. EPA FAILED TO DEMONSTRATE THAT TECHNOLOGY IS BOTH "AVAILABLE" AND "ECONOMICALLY ACHIEVABLE" TO MEET THE 1983 DISCHARGE LEVELS

The defects in EPA's designated technology for 1977 are enormously compounded when the technology and corresponding discharge levels for 1983 are considered.

Congress carefully distinguished the technology required for 1977 and 1983 respectively. Thus, as explained by Senator Muskie in the Senate debates:

"[R]ather than establishing the range of levels in reference to the average of the best performers in an industrial category [1977], the range should, at a minimum, be established with reference to the best performer in any industrial category [1983]" (emphasis added).

Likewise, Congress contemplated for 1983 only "those plant processes and control technology which, at the pilot plant, semi-works, or other level, have demonstrated both technological performance and economic viability at a level sufficient to reasonably justify the making of investments in such new facilities." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 103 (1972) (emphasis added).

When judged against these tests, the technology and processes designated for application in 1983 are neither "available" nor "economically achievable."

First of all, the technology now specified by EPA for 1977 ironically fits much more closely the definition of technology fashioned by Congress for 1983. For, as noted above, EPA's 1977 discharge levels are satisfied only by "the best performer" within the petroleum refining category, i.e., the Sun Oil Duncan, Oklahoma facility, which alone among the twelve "exemplary" plants selected from over 250 refineries actually meets specified levels for each pollutant parameter.

Over and above this premature implementation of 1983 control technology in 1977, the activated carbon treatment selected by EPA for 1983 fails to demonstrate the "technological performance" and "economic viability" contemplated by Congress.

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With the exception of literature references outside the petroleum industry, EPA's selection of activated carbon treatment of 1983 rests solely on the experience of a single pilot plant at the BP Marcus Hook refinery. The optimistic results originally reported from this pilot project are undercut by more recent reports (included in the attached Comments) from both the full-scale Marcus Hook activated carbon plant and pilot plant results from three other refineries.

Moreover, as detailed in the attached Comments, wholly apart from its effectiveness in controlling organic constituents, activated carbon fails to remove adequately, and may even introduce, additional ammonia and sulfides into the effluent. */

In short, the discharge levels ordered by EPA for 1983 are based on sheer speculation, unsupported by "available" and "economically achievable" technology.

Consequently, the 1983 "effluent limitations guidelines" should be withdrawn and promulgation of further regulations postponed until sound evidence is forthcoming regarding effluent discharge levels which are technologically and economically achievable by 1983.

E. EPA FAILED TO CONSIDER REQUIRED STATUTORY
FACTORS IN PROMULGATING 1977 AND 1983
DISCHARGE LEVELS

As detailed above, EPA has imposed unlawfully stringent effluent discharge standards for 1977 and 1983. **/

This erroneous and illegal result, which completely ignores the highly variable circumstances of individual refineries, nevertheless accords with EPA's consistent failure to address specific factors spelled out in Sections 304(b)(1)(B) and (b)(2)(B) of the Act.

*/ The drawbacks of activated carbon treatment, which is neither a "demonstrated" nor "available" technology, also invalidate the petroleum refining new source "standards of performance" issued by EPA.

**/ Indeed, as set forth in Part A of this letter, EPA is barred from issuing any standards for existing sources; rather, the Agency should publish "guidelines for effluent limitations" to be utilized on a "plant-by-plant" basis by States and Regional Administrators in individual permits.

Congress intended by these provisions that the Administrator give "specific and detailed consideration" to factors including, among others, the "age of equipment and facilities," "the process employed," and "the total cost of application of technology in relation to the effluent reduction benefits to be achieved." H.R. Rep. 92-911, 92d Cong., 2d Sess. 107 (1972); Section 304(b)(1)(B).

Far from giving the "specific and detailed consideration" mandated by Congress, EPA has largely disregarded these statutory factors.

1. EPA's Failure to Consider Cost-Benefit Factors

To begin with, EPA made no attempt whatsoever to predict, much less quantify, the "effluent reduction benefits to be achieved" in 1977, and to balance such benefits against the "total cost" of implementing the designated 1977 technology. Indeed, as demonstrated by the attached Comments, even EPA's analysis of the "total cost" of meeting the May 9, 1974 regulations is superficial and inadequate.

On this ground alone, EPA's 1977 regulations are unlawful and invalid.

2. EPA's Failure to Consider the "Age of Equipment and Facilities"

Similarly, EPA simply dismissed the "age of equipment and facilities" as a factor to be considered, even though achievement of the prescribed discharge levels, including particularly the dictated flow reductions, is critically dependent upon the age of the refinery and related factors which affect the ability to make in-plant changes.

This disregard of "age" factors invalidates both the 1977 and 1983 regulations.

3. EPA's Failure to Consider the "Process Employed"

Likewise, until the eleventh hour, EPA completely ignored the diverse processes employed in petroleum refineries and their variable contribution to effluent discharge levels. Only in the final regulations are such processes considered, and even then, no credit is given in the calculated discharge

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levels for petrochemical, hydrotreating and other processes which contribute substantially to raw waste loading and effluent discharge. */

Accordingly, the 1977 and 1983 regulations, as well as the new source standards of performance, are unsupportable and invalid.

4. EPA's Failure to Consider Temperature Effects and Crude Feedstock Composition

In addition to the factors specifically listed in the Act, Congress also intended that EPA take into account "such other factors" as are particularly relevant to effluent discharge control in a given industrial category.

API and member companies have repeatedly stressed the importance of climatic conditions and temperature, as well as crude type and composition, in affecting and determining petroleum refinery effluent discharge levels. The attached Comments include new analyses and data, again demonstrating the critical significance of these factors.

Unless and until such factors are given the "specific and detailed consideration" intended by Congress, the May 9, 1974 regulations cannot be upheld.

CONCLUSION

For the reasons set forth above, the May 9, 1974 regulations are unlawful and must be withdrawn.

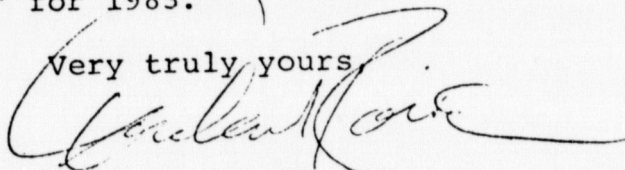
Thereafter, EPA should promulgate, not rigid discharge standards for existing refineries, but flexible "guidelines for effluent limitations" to be utilized by the States and Regional Administrators on a "plant-by-plant" basis in permits.

*/ Because EPA failed to credit such processes, companies operating petrochemical or integrated refineries face considerably more stringent discharge levels than if their refining and petrochemical operations were considered separately, i.e., by adding the permissible discharge level from applicable chemical industry "guidelines" to the levels permitted for cracking or lube refineries respectively under the May 9, 1974 regulations. Cf. Industrial Union Dept. v. Hodgson, 499 F.2d 467, 480-81 (D.C. Cir. 1974); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 389-90 (D.C. Cir. 1973).

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In promulgating such "guidelines," EPA should give specific and detailed consideration to all the statutory "factors" and identify the range of discharge levels attainable by technology which is "practicable" and "currently available" for 1977 and by technology and processes which are "available" and "economically achievable" for 1983.

Very truly yours,



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